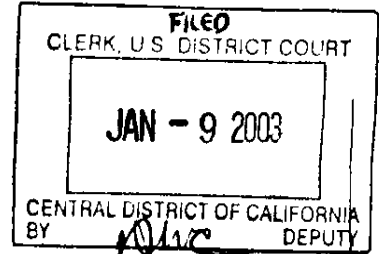


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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS
 INC., et al.,

Plaintiffs,

v.

GROKSTER, LTD., et al.,

Defendants.

CV 01-08541-SVW (PJWx) ✓
 CV 01-09923-SVW (PJWx)

ORDER DENYING DEFENDANT SHARMAN
 NETWORKS LTD.'S AND DEFENDANT
 LEF INTERACTIVE'S MOTIONS TO
 DISMISS

JERRY LEIBER, et al.,

Plaintiffs,

v.

CONSUMER EMPOWERMENT BV a/k/a
 FASTTRACK, et al.,

Defendants.

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I. INTRODUCTION

Plaintiffs bring these actions for copyright infringement under 17 U.S.C. §§ 501, et seq. The Court has jurisdiction pursuant to 28 U.S.C. § 1331. Defendant Sharman Networks Ltd. moves to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue, and forum non conveniens. See Fed. Rules Civ. P.

412

1 Rules 12(b)(1), (2), and (3). Defendant LEF Interactive Pty Ltd.
2 moves to dismiss for lack of personal jurisdiction only.

3 For the reasons set forth below, both Motions are DENIED.
4

5 II. FACTUAL/PROCEDURAL BACKGROUND

6 A. The Parties

7 These two related cases arise from the free exchange of
8 copyrighted music, movies and other digital media over the Internet.
9 When the actions were originally filed, Defendants Grokster, Ltd.
10 ("Grokster"), Streamcast Networks, Inc. (formerly known as
11 MusicCity.com, Inc.) ("Streamcast" or "MusicCity"), and Kazaa BV
12 (formerly known as Consumer Empowerment BV) ("Kazaa BV"), distributed
13 software that enabled users to exchange digital media via the same
14 peer-to-peer transfer network. In the Metro-Goldwyn-Mayer. v.
15 Grokster case, CV-01-8541, Plaintiffs are organizations in the motion
16 picture and music recording industries, and bring an action against
17 Defendants for copyright infringement, pursuant to 17 U.S.C. §§ 501,
18 et seq. In the Lieber v. Consumer Empowerment case, CV-01-9923,
19 Plaintiffs are professional songwriters and music publishers bringing
20 a class action for essentially the same claims against the same
21 Defendants. The cases have been consolidated for discovery and
22 pretrial purposes.

23 When the actions were originally filed, Grokster, MusicCity and
24 Kazaa BV each independently branded, marketed and distributed file-
25 sharing software. All three platforms were powered, however, by the
26 same "FastTrack" networking technology. This technology was
27 developed by Defendants Niklas Zennström and Janus Friis (who also
28

1 launched Kazaa BV), and licensed to each company. As a result, users
2 of all three software platforms were connected to the same peer-to-
3 peer "FastTrack network," and were able to exchange files
4 seamlessly.¹

5 Kazaa BV, which is a Netherlands corporation, did not contest
6 jurisdiction in either case. Rather, it answered and counterclaimed
7 for declaratory relief. In January 2002, while related legal action
8 was pending against it in the Netherlands, Kazaa BV transferred
9 ownership of key assets to the newly-formed Sharman Networks, Ltd.
10 ("Sharman").² Sharman is a company organized under the laws of the
11 island-nation of Vanuatu and doing business principally in Australia.
12 The assets transferred to Sharman include the Kazaa.com website and
13 domain, and the Kazaa Media Desktop ("KMD") software. In its
14 agreement to acquire these assets, Sharman explicitly disclaimed
15 assumption of any of Kazaa BV's liabilities, including any liability
16 arising from these lawsuits. (Memo of P&A in Support of Sharman's
17

18 ¹ This state of affairs has changed somewhat since the cases
19 were filed. First, as discussed infra, the operation of the "Kazaa
20 system" has passed from Kazaa BV to Sharman Networks, Ltd. Second,
21 the Streamcast/MusicCity Defendant no longer uses the FastTrack
22 technology. Rather, Streamcast now employs the "open" (i.e., not
23 proprietary) Gnutella networking technology, and distributes its own
24 software instead of a branded version of the Kazaa Media Desktop,
25 which it previously used. As a result, users of Streamcast's
26 product, Morpheus, no longer connect to the FastTrack network and do
27 not exchange files with Grokster or Kazaa users. Instead, they
28 connect to the Gnutella network and are able to exchange files with
users of any number of Gnutella clients.

25 ² Sharman is owned by Australian businessperson Nicola
26 Hemming. However, Kazaa BV principal Niklas Zennström apparently
27 helped bankroll Sharman by lending some up-front money used to
28 purchase Kazaa BV's assets. Sharman then repaid the loan out of
revenue subsequently derived from these assets. (Decl. of Ana C.
Reyes in Support of Opposition to Defendants' Motions, Hemming Dep.,
at 168-173.)

1
2 Motion to Dismiss for Lack of Subject Matter Jurisdiction and Other
3 Grounds ("Sharman Mot."), Declaration of Nicola Hemming, ¶6.)

4 The FastTrack software is owned by a company known as Joltid,
5 Ltd. ("Joltid" (formerly "Blastoise")), which is owned by Zennström.
6 Shortly after Sharman's acquisition of the Kazaa assets, Joltid
7 granted an "irrevocable, perpetual, worldwide license" to Sharman for
8 the use and sub-licensing of FastTrack. (Sharman's Reply Memorandum
9 in Support of Motion to Dismiss ("Reply"), Declaration of Nicola
10 Hemming Concerning Blastoise Agreement, Exh. A, at 1.) In return,
11 Joltid receives twenty percent of Sharman's revenue. (Id.; Decl. of
12 Ana C. Reyes in Support of Opposition to Defendants' Motion, Hemming
13 Dep. at 152.) In essence, Sharman has acquired Kazaa BV's primary
14 assets - the Kazaa brand, domain and website, the KMD software, and a
15 long-term license to the FastTrack software - without having formally
16 acquired the company. Meanwhile, Kazaa BV has apparently ceased
17 defending this action.

18
19 **B. The Kazaa System**

20 Although novel in important respects, the "Kazaa system"
21 operates in a manner conceptually analogous to the Napster system
22 described at length by the district court in A&M Records, Inc. v.
23 Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000).

24 In summary, Sharman provides free proprietary software, the
25 Kazaa Media Desktop, that enables Internet users to search for and
26 exchange digital media with other users of file-sharing software
27 powered by the FastTrack technology. Sharman also operates the
28

1 Kazaa.com website, which serves as a central distribution and
2 customer support hub for the KMD software.

3 The KMD software can be transferred to the user's computer, or
4 "downloaded," from servers operated by Sharman (for instance, by
5 visiting Sharman's Kazaa.com website, or third-party CNET's
6 Download.com, and choosing to download the software). Once
7 installed, each KMD user may elect to "share" certain files located
8 on the user's computer, including, for instance, music files, video
9 files, software applications, e-books, and text files. When launched
10 on a user's computer, KMD automatically connects to the FastTrack
11 peer-to-peer network, and makes any shared files available for
12 transfer to any other user's computer.

13 Once connected to the FastTrack network, the KMD software
14 provides a range of means through which a user may search through
15 this pool of shared files. For instance, a user can select to search
16 only among audio files, and then enter a keyword title or artist
17 search. Once a search commences, the KMD software displays a list
18 (or partial list) of users who are currently sharing files that match
19 the search criteria, including data such as the estimated time
20 required to transfer each file. The user may then click on a
21 specific listing to initiate a direct transfer from the source
22 computer to the requesting user's computer. When the transfer is
23 complete, the requesting user and source user have identical copies
24 of the file, and the requesting user may also start sharing the file
25 with others. The KMD software includes other features, such as
26 facilities for organizing, viewing and playing media files, and for
27 communicating with other users.
28

1 Because the KMD software itself is free, most of Sharman's
2 revenue comes through its advertising partnerships. Instead of
3 selling advertising directly, Sharman "bundles" its KMD software with
4 third-party software that operates whenever KMD is launched. The
5 third-party software retrieves advertising from third-party servers
6 not controlled by Sharman, and then displays that advertising through
7 the KMD interface.

8 9 III. SHARMAN'S MOTION TO DISMISS

10 A. Personal Jurisdiction

11 For this Court to have personal jurisdiction over the
12 Defendants, the exercise of jurisdiction must be authorized under
13 California's "long-arm" jurisdictional statute and comport with
14 constitutional due process limitations. Aanestad v. Beech Aircraft
15 Corp., 521 F.2d 1298, 1300 (9th Cir. 1974); see Fed. R. Civ. P.
16 4(k)(1)(A). Because California authorizes jurisdiction to the full
17 extent of the Constitution, the only question before the Court is
18 whether the exercise of in personam jurisdiction in this case is
19 consistent with due process. See Cal. Code Civ. Proc. § 410.10
20 (2002); Peterson v. Highland Music, Inc., 140 F.3d 1313, 1317 n.2
21 (9th Cir. 1998).

22 Plaintiff has the burden of establishing that jurisdiction
23 exists over the Defendants. Cubbage v. Merchant, 744 F.2d 665, 667
24 (9th Cir. 1984), cert. denied, 470 U.S. 1005, 105 S. Ct. 1359 (1985).
25 However, the plaintiff need only make a prima facie showing of
26 jurisdiction to survive a jurisdictional challenge on a motion to
27 dismiss where, as here, a court has not heard testimony or made
28

findings of fact.³ Ziegler v. Indian River County, 64 F.3d 470, 473 (9th Cir. 1995); Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 268 (9th Cir. 1995); Data Disc Systems, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). For purposes of a motion to dismiss, factual allegations are taken as true, though it is appropriate when considering jurisdictional issues to look beyond the pleadings to any evidence before the Court. Cargill Intern. S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1019 (2d Cir. 1993).

In the absence of a traditional basis for asserting jurisdiction (i.e., physical presence, domicile or consent), due process requires that a non-resident defendant have "certain minimum contacts with the forum [state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

³ Defendant LEF Interactive PTY, Ltd. ("LEF") argues that because Plaintiffs have taken extensive discovery on the jurisdictional issue, they should be held to a "preponderance of the evidence" burden. (LEF's Reply to Pls.' Opp. to Mot. to Dismiss, at 3.) LEF cites one Second Circuit case and one District of Columbia case that seem to support this proposition. (*Id.*)

However, this Court is not governed by those decisions. Rather, the controlling authority in this circuit is that set forth in Data Disc and reaffirmed in Omeluk and Ziegler. The Data Disc court established that where jurisdiction is determined by written materials, such as "affidavits or affidavits plus discovery materials," a plaintiff must make only a prima facie case of jurisdiction. 557 F.2d at 1285. Where these materials raise issues of credibility or disputed questions of fact, the district court in its discretion may order a preliminary hearing to resolve the contested issues. *Id.* Only "[i]n this situation, where the plaintiff is put to his full proof," is plaintiff required to "establish the jurisdictional facts by a preponderance of the evidence . . ." *Id.* Plaintiffs in this case have been limited to written submissions; the Court has not conducted a hearing or made findings of fact. Thus, Plaintiffs are obligated under Data Disc to make only a prima facie showing. Moreover, the Court notes that most of the key jurisdictional facts are essentially undisputed. As set forth *infra*, they present a compelling case for jurisdiction over both Sharman and LEF, effectively mooted the question of which burden applies.

1 International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66
2 S. Ct. 154 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463
3 (1940)). The defendant is subject to "specific jurisdiction" where
4 the cause of action arises out of or relates to the defendant's
5 contacts with the forum. Burger King Corp. v. Rudzewicz, 471 U.S.
6 462, 472 & n.15, 105 S. Ct. 2174 (1985). If the defendant's contacts
7 are of a sufficient magnitude, it is subject to "general
8 jurisdiction" - that is, subject to suit on any matter, including
9 those not arising out of the in-forum activity. See Perkins v.
10 Benquet Consol. Mining Co., 342 U.S. 437, 447-48, 72 S. Ct. 413
11 (1952).

12
13 1. In-Forum Activities

14 Plaintiffs assert that Sharman engages in a wide range of
15 contacts with this forum, which can be summarized roughly as follows:

- 16 1) Provision of the KMD software to approximately two million
17 California residents and execution of end-user license
18 agreements between Sharman and these users;
- 19 2) Use of California and U.S. agents, including a Los Angeles-
20 based public relations firm, a California company engaged
21 in selling and serving advertising to users of the KMD
22 software, and a San Francisco-based law firm;
- 23 3) Contracts Sharman assumed from Kazaa BV, including use of
24 California-based CNET.com for recording the number of
25 copies of Defendant's software downloaded, and advertising-
26 related agreements with California and U.S. companies; and,

1 4) Inclusion in certain contracts assumed from Kazaa BV of
2 California and other U.S. state choice of law and forum
3 selection clauses, including in the FastTrack licensing
4 agreement.

5 (Plaintiffs' Memorandum in Opposition to Defendants Sharman's and
6 LEF's Motions to Dismiss ("Opp.") at 4-10.)
7

8 2) General Jurisdiction

9 Plaintiffs do not make a serious case for general jurisdiction,
10 instead consigning their argument on this point to a two-sentence
11 footnote. (See Opp. at 12 n.8.) Indeed, it appears that while
12 Sharman has engaged in a continuous stream of contacts with the
13 forum, they are not the types of contacts that generally approximate
14 physical presence. They are therefore insufficient to establish
15 general jurisdiction.

16 General jurisdiction over a non-resident defendant exists where
17 the defendant's contacts are "continuous and systematic," and the
18 exercise of jurisdiction satisfies "traditional notions of fair play
19 and substantial justice." Ziegler, 64 F.3d at 473. The standard for
20 establishing general jurisdiction is "fairly high," Brand v. Menlove
21 Dodge, 796 F.2d 1070, 1073 (9th Cir. 1986), and requires that
22 defendant's contacts be of the sort that "approximate physical
23 presence." Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d
24 1082, 1086 (9th Cir. 2000) (citing Gates Lear Jet Corp v. Jensen, 743
25 F.2d 1325, 1331 (9th Cir. 1984)). The Supreme Court has upheld
26 general jurisdiction only once, in a case involving wide-ranging
27
28

1 contacts,⁴ and the Ninth Circuit regularly has declined to find
2 jurisdiction even in the presence of extensive contacts. Amoco Egypt
3 Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 851 n.3 (9th Cir.
4 1993), citing Perkins, 342 U.S. 437.

5 Factors to be taken into consideration in this analysis include
6 whether the defendant is incorporated or licensed to do business in
7 the forum state, has offices, property, employees or bank accounts
8 there, pays taxes, advertises or solicits business, or makes sales in
9 the state. See Hirsch v. Blue Cross, Blue Shield of Kansas City, 800
10 F.2d 1474, 1478 (9th Cir. 1986); Bancroft & Masters, 223 F.3d at
11 1086; Amoco Egypt Oil Co., 1 F.3d at 851 n.3.

12 As discussed infra, Sharman certainly engages in a continuous
13 stream of commercial contact with the forum state, including
14 provision of its software and execution of licensing agreements with
15 a large number of California residents. It also engages in more
16 limited commercial contact with advertising vendors, a website for
17 counting downloads of its software, and in-state legal and public
18 relations representatives. However, Sharman is not registered or
19 licensed to do business in California, nor does it appear to have any
20 substantial presence here (e.g., offices, employees or assets).
21 Commercial contact absent other indicia of corporate presence is
22 typically not sufficient to establish general jurisdiction. See
23 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104
24 S. Ct. 1868 (1984) (no general jurisdiction where Colombian
25

26 ⁴ During Japanese occupation of the Philippines, a Philippine
27 company conducted most of its business affairs from the president's
28 home and office in Ohio, including board meetings, correspondence,
banking and payment of salaries. Perkins, 342 U.S. at 447-48.

1 corporation repeatedly purchased helicopter parts in Texas and sent
2 employees there for training, but did not have offices, agents,
3 employees or a license to do business there). In short, it is
4 impossible based upon the contacts alleged in this case to conclude
5 that Sharman "may in fact be said already to be 'present'" in
6 California. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d
7 406, 413 (9th Cir. 1977).

8 Thus, general jurisdiction is not available in this case, and
9 the Court must look to whether specific jurisdiction is appropriate.
10

11 3) Specific Jurisdiction

12 "The Due Process Clause protects an individual's liberty
13 interest in not being subject to the binding judgment of a forum with
14 which he has established no meaningful 'contacts, ties, or
15 relations.'" Burger King, 471 U.S. at 471-72 (quoting International
16 Shoe Co. v. Washington, 326 U.S. at 319). Despite the somewhat
17 nebulous nature of this inquiry, courts typically apply rather
18 mechanical tests, which necessarily have arisen from long experience
19 in this area. These tests are instructive, however, and not
20 necessarily definitive. See Ochoa v. J.B. Martin & Sons Farms, 287
21 F.3d 1182, 1189 n.2 (9th Cir. 2002). Rather, the central due process
22 inquiry remains whether an exercise of jurisdiction is "consistent
23 with traditional notions of fair play and substantial justice."
24 Quill Corp. v. North Dakota, 504 U.S. 298, 307, 112 S. Ct. 1904
25 (1992) (quoting International Shoe, 326 U.S. at 316) (internal
26 citation omitted)).
27
28

1 Under prevailing Ninth Circuit doctrine, specific jurisdiction
2 is presumptively reasonable where: 1) a nonresident defendant
3 purposefully avails itself of the privilege of conducting activities
4 in the forum state, thereby invoking the protections of its laws; and
5 2) the plaintiff's claims arise out of the defendants' forum-related
6 activities. See Ochoa v J.B. Martin & Sons Farms, 287 F.3d at 1189 &
7 n.2; Ziegler, 64 F.3d at 473.

8
9 a) Purposeful Availment and Relatedness

10 The purposeful availment prong requires that defendant
11 purposefully direct its activities toward the forum, or purposefully
12 avail itself of the privilege of conducting activities within the
13 forum state, thus invoking the benefits and protections of local law.
14 See, e.g., Data Disc, 557 F.2d at 1287-88 (commercial act or
15 transaction with forum); Bancroft & Masters, 223 F.3d at 1087 (effect
16 of tortious act felt in forum).

17
18 1) Unrelated Contacts

19 Before considering whether Sharman's contacts constitute
20 "purposeful availment," it is important to note that several seem
21 immediately to fail the second prong of the specific jurisdiction
22 analysis: relatedness.

23 Contacts with a forum state are relevant for purposes of
24 specific jurisdiction only if they are sufficiently related to the
25 cause of action. The Ninth Circuit adopts a broad, "but for" test of
26 relatedness. See Loral Terracom v. Valley National Bank, 49 F.3d
27 555, 561 (9th Cir. 1995) (second prong of jurisdictional analysis is
28

1 met if, but for the contacts between the defendant and the forum
2 state, the cause of action would not have arisen); Carnival Cruise
3 Lines, Inc. v. Shute, 499 U.S. 585, 589, 111 S. Ct. 1522 (1991)
4 (declining to consider the Ninth Circuit's "but for" test, and
5 reversing on other grounds). Thus, if Plaintiffs' claims would have
6 arisen notwithstanding certain contacts, those contacts are not
7 relevant to the jurisdictional analysis. See Ballard v. Savage, 65
8 F.3d 1495, 1500 (9th Cir. 1995).

9 To justify the relatedness of many of the contacts above,
10 Plaintiffs offer variations of their rather conclusory argument that
11 all the contacts are "necessary to every single aspect of
12 [Defendants'] infringing business. . . ." (Opp. at 18.) In other
13 words, but for Sharman's overall corporate activities, it would not
14 be in business and would not be engaging in the alleged infringement
15 of Plaintiffs' copyrights. Plaintiffs argue that contacts such as
16 corporate contracts, the retention of law and public relations firms,
17 and advertising-related sales, all go toward perpetuating Sharman's
18 business, and thus enabling the infringement of which Plaintiffs
19 complain. (See Opp. at 14-18.)

20 It is true that the Ninth Circuit's "but for" test of
21 relatedness is broader than those adopted by certain other circuits.
22 See Nowak v. Tak How Invs., 94 F.3d 708, 714-15 (1st Cir. 1996)
23 (comparing tests). Nonetheless, "but for contacts" still must have
24 some degree of proximate causation to be considered for purposes of
25 jurisdiction. See, e.g., Doe v. American Nat'l Red Cross, 112 F.3d
26 1048, 1051-52 (9th Cir. 1997) (alleged negligence of FDA official in
27 regulating blood supply too attenuated from actual injury to be
28

1 considered but for cause of death resulting from transfusion of
2 tainted blood).

3 Plaintiffs' implicit theory of relatedness would swallow the
4 rule, at least with respect to corporate defendants. All corporate
5 contacts are, in some sense, intended to further corporate purposes.
6 But no court has held that this fact dispenses with the relatedness
7 analysis. Rather, contacts may only be considered for purposes of
8 the jurisdictional analysis if they are sufficiently related to the
9 underlying causes of action. See Bancroft & Masters, 223 F.3d at
10 1088 (pertinent contacts are those "that give rise to the current
11 suit"); Marino v. Hyatt Corp., 793 F.2d 427, 430 (1st Cir. 1987)
12 (proximate causation test); Sybaritic, Inc. v. Interport Int'l, Inc.,
13 957 F.2d 522, 524-25 (8th Cir. 1992) (same); Third Nat'l Bank in
14 Nashville v. WEDGE Group, Inc., 882 F.2d 1087, 1091 (6th Cir. 1989)
15 ("substantial connection" test); In re Oil Spill by Amoco Cadiz off
16 Coast of France, 699 F.2d 909, 917 (7th Cir. 1983) (similar).

17 Contacts with U.S. agents such as public relations
18 representatives and lawyers, contacts respecting advertising
19 relationships, and the use of a California company for counting
20 downloads of Sharman's software, are simply not but for causes of the
21 alleged infringement. Further, the fact that Sharman may have
22 executed or assumed contracts containing California forum selection
23 or choice of law provisions is immaterial on this point with respect
24 to contracts that are essentially unrelated to Plaintiffs' claims.
25 (See Opp. at 9-10 n.6 & 7.) The only contract with such provisions
26 that is even peripherally related to these cases is a license for use
27
28

1 of the FastTrack peer-to-peer technology that powers the KMD
2 software. Such a license is simply too attenuated from the
3 infringement itself to be considered a significant contact in the
4 jurisdictional analysis.

5 Plaintiff does allege that Sharman engages in "geo-targeted"
6 advertising, i.e., advertising that is targeted to California
7 residents. In at least one outlier case, advertising that gave rise
8 to a plaintiff's claims was held to be sufficiently related to those
9 claims. See Nowak, 94 F.3d at 715 (Hong Kong hotel's solicitation of
10 business in Massachusetts sufficient to justify jurisdiction in
11 Massachusetts over claims related to Massachusetts resident's
12 drowning death in hotel's pool). Here, however, the advertising seen
13 by users is served by third-party companies, which pay Sharman to
14 bundle their advertising software with Sharman's KMD. Thus, any
15 targeting of forum residents is done by other companies and not by
16 Sharman. More significantly, there is no evidence that this
17 advertising gave rise to Plaintiffs' claims, i.e., that the
18 advertising itself is a relevant contact for purposes of jurisdiction
19 over the copyright claims.

20
21 2) Related Contacts

22 In contrast, Sharman's distribution of the KMD software, and
23 licensing of its use, are "but for" causes of the alleged
24 infringement. But for Sharman's acts in these regards, Plaintiffs'
25
26
27
28

1 claims of direct infringement never would have arisen against
2 Sharman.⁵

3 Defendant's chief argument against purposeful availment is that
4 its "internet activities" are "passive in nature," and that, while
5 the KMD software can be downloaded by anyone in the world, Sharman
6 "does not purposefully direct anything toward California." (Mot. at
7 18.) Rather, Sharman asserts that it "does not know the identity" of
8 persons downloading its software nor does it know where they reside.
9 (Reply at 12.) In short, Sharman contends, the KMD software is made
10 freely available worldwide, and the only distribution contacts with
11 California are those initiated by California residents.

12 Indeed, the Supreme Court has held that personal jurisdiction
13 cannot be exercised constitutionally where the only contact with the
14 forum state is the result of an isolated or fortuitous act not
15 directed by the defendant. See World-Wide Volkswagen Corp. v.
16 Woodson, 444 U.S. 286, 100 S. Ct. 559 (1980) (no Oklahoma
17 jurisdiction over New York automobile dealer in products liability
18 action where the only contact with the forum was the sale of the car
19 to New York residents who subsequently drove the vehicle to Oklahoma
20 and suffered injuries there); Kulko v. Superior Court, 436 U.S. 84,
21 98 S. Ct. 1690 (1978) (consent by father, who is a New York resident,
22 to allow children to live with mother who had relocated to California
23

24 ⁵ Technically, Sharman's distribution of its software to
25 California residents is a but for cause of only a portion of the
26 injuries alleged: those resulting from use of the software by
27 California residents. To the extent that this distinction would
28 deprive California state courts of jurisdiction over certain aspects
of these cases, this Court nonetheless may consider Sharman's other
U.S. contacts under Rule 4(k)(2) of the Federal Rules of Civil
Procedure. See infra.

1 not sufficient to establish jurisdiction over father in California
2 for enforcement of child support obligations); Hanson v. Denckla, 357
3 U.S. 235, 78 S. Ct. 1228 (1958) (no jurisdiction in Florida over
4 Delaware corporate trustee where trust was executed in Delaware and
5 plaintiff then relocated to Florida).

6 Consequently, this Court previously has recognized that the
7 operation of a "strictly 'passive' website, in which the only
8 contacts with the forum state consist[] of mere viewings of the
9 website's content by those surfing the internet," typically will not
10 give rise to specific jurisdiction. Batzel v. Smith, 2001 U.S. Dist.
11 LEXIS 8929, at *7 (C.D. Cal. June 6, 2001). On the other hand,
12 jurisdiction may be appropriate where the Internet conduct includes
13 "something more" to show the plaintiff directed substantial activity
14 toward the forum. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414,
15 418 (9th Cir. 1997). These poles reflect a familiar spectrum,
16 wherein jurisdiction is more likely the greater the "'level of
17 interactivity and commercial nature of the exchange of information
18 that occurs'" with the forum state. Id. at 418 (quoting Zippo Mfg.
19 Co. v. Zippo Dot Com, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

20 In this analysis, the Court considers the scope and nature of
21 the related contacts. Factors include whether the defendant
22 encouraged residents of the forum state to engage in relevant
23 contacts with the defendant, whether there is evidence that the
24 contacts constitute a continuous and substantial part of the
25 defendant's business, whether the defendant exchanged messages with
26 forum residents or gained subscribers through its contacts, or
27 whether the defendant otherwise purposefully availed itself of the
28

1 privilege of doing business in the forum. Cybersell, Inc., 130 F.3d
2 at 419; see CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir.
3 1996) (finding jurisdiction where defendant entered into contract to
4 distribute shareware via server located in forum state).

5 Here, there is little question that Sharman has knowingly and
6 purposefully availed itself of the privilege of doing business in
7 California. First, Sharman essentially does not dispute that a
8 significant number of its users - perhaps as many as two million -
9 are California residents.⁶ Indeed, given that Sharman's KMD software
10 has been downloaded more than 143 million times,⁷ it would be mere
11 cavil to deny that Sharman engages in a significant amount of contact
12 with California residents.

13 Second, Sharman does not dispute that the distribution of its
14 software is an essentially commercial act. While the KMD software is
15 freely available, it is distributed for the singular purpose of
16 facilitating advertising and otherwise generating income for Sharman.
17 Moreover, Sharman enters into a licensing agreement with every user
18 authorizing and limiting use of the software. While Sharman may not
19

20 ⁶ Plaintiffs claim that the Kazaa software has been
21 downloaded by at least 20 million U.S. users. (See Reyes Decl., Exh.
22 34.) Plaintiffs base this estimate on a May 28, 2002 statement by a
23 representative of one of Sharman's third-party advertising vendors,
24 which is admissible pursuant to Rule 801(d)(2) of the Federal Rules
25 of Evidence. Because California accounts for twelve percent of the
26 U.S. population, Plaintiffs reasonably conclude that at least two
million California residents have downloaded the software. (Opp. at
5.) Defendant responds primarily by arguing that "[n]o figures of
this kind have ever been developed or documented by Sharman." (Reply
at 11.) Notably, Sharman does not argue that Plaintiffs' figure is
somehow inaccurate.

27 ⁷ CNET's Download.com, the website Sharman uses to track the
28 number of times its software is downloaded, recently reported
143,056,276 total downloads. (See Reyes Decl., Exh. 74.)

1 ask each user where he or she is located, and may therefore not know
2 exactly how many agreements it has entered into with California
3 residents, Sharman is at least constructively aware that many such
4 agreements are executed daily.⁸

5 In sum, Sharman engages in a significant quantum of commercial
6 contact with California residents constituting a but for cause of
7 Plaintiffs' claims. Jurisdiction is therefore presumptively
8 reasonable.

9
10 3) Alternative Basis for Purposeful Availment:
11 Effects Test

12 Even if purposeful availment were not manifested by Sharman's
13 commercial contacts, it nonetheless may be demonstrated through the
14 "effects test." Because the Court has already concluded that
15 Plaintiffs have established a prima facie case of purposeful
16 availment, however, the following merely articulates a partial
17 alternative basis for its conclusion.

18
19 ⁸ Sharman argues that these agreements are nothing more than
20 "passive notification" to potential customers of the terms of the
21 software's use, and that such "clickwrap" agreements do not support
22 personal jurisdiction. (Reply at 11.) Sharman's citation to
23 Westcode, Inc. v. RBE Elecs. Inc., 2000 WL 124566 (E.D. Pa. Feb. 1,
24 2000), for this contention actually undermines its argument. The
25 agreement at issue in Westcode was an acknowledgment of the terms and
26 condition for use of defendant's website. Id., at *6. However, the
27 website "simply [sought] to provide information to interested
28 parties." Id. Because the website was a passive, informational
site, an agreement regulating its use bore "no relationship to the
sale of goods." Id., at *6 n.2. Here, the KMD software is designed
as a commercial product, and the agreement is designed to authorize
and facilitate an essentially commercial relationship between Sharman
and its users. Moreover, the Westcode court noted the absence of any
evidence that a significant number of forum residents accessed the
site. Id., at *6. Here, there is evidence that perhaps two million
forum residents have downloaded and use Sharman's product.

1. Legal Standards

Even where a defendant does not directly contact the forum state, purposeful availment may be demonstrated where the effects of a defendant's conduct are felt in the forum state. Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482 (1984) (establishing the "effects test" for personal jurisdiction); Panavision Int'l L.P. v. Toeppen, 141 F.3d 1316, 1321-22 (9th Cir. 1998) (sustaining jurisdiction over a non-resident defendant who registered Internet domain names that infringed plaintiff's trademarks). Under the Calder line of cases, personal jurisdiction is appropriate where a non-resident defendant engages in "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered - and which the defendant knows is likely to be suffered - in the forum state." Panavision, 141 F.3d at 1321 (quoting Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1486 (9th Cir. 1993)).

Sharman does not dispute that jurisdiction typically is appropriate where a foreign defendant engages in significant infringement of a resident's intellectual property, and knows where the harm from that infringement is likely to be suffered. (See Sharman Reply at 6-7.) See Panavision, supra; Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, 34 F.3d 410 (7th Cir. 1994) (upholding Indiana jurisdiction in trademark infringement action by National Football League's Indianapolis Colts against Canadian Football League's Baltimore CFL Colts).

Rather, Defendant argues that the effects test, as applied by Calder and its progeny, has not been used to establish jurisdiction against someone "other than the actual wrongdoer directly causing the

1 harm. . . ." (Sharman Reply at 7.) According to Sharman, the
2 effects test requires an intent to cause a "tortious effect" within
3 the forum state. (Sharman Reply at 8.) Sharman concludes that
4 because the primary claims in this case arise from direct
5 infringement by its users, and not by Sharman itself, the effects
6 test does not apply. (Id. at 9.)

7 Although there is some merit to these contentions, Sharman does
8 not adequately distinguish between Plaintiffs' theories of liability.
9 The effects test is likely sufficient to show purposeful availment
10 for purposes of the contributory infringement claims, while it might
11 not be able to support an exercise of jurisdiction over the vicarious
12 infringement claims.

13 14 2. Contributory Infringement

15 Contributory infringement originated in tort and "stems from the
16 notion that one who *directly contributes* to another's infringement
17 should be held accountable." Fonovisa, Inc. v. Cherry Auction, Inc.,
18 76 F.3d 259, 264 (9th Cir. 1996) (emphasis added). Thus, the
19 traditional statement of the doctrine, adopted in this circuit, is
20 that "[o]ne who, with knowledge of the infringing activity, induces,
21 causes or materially contributes to the infringing conduct of
22 another, may be held liable as a 'contributory' infringer." Gershwin
23 Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159,
24 1162 (2d Cir. 1971), cited in Fonovisa, Inc., 76 F.3d at 264. In
25 other words, "liability exists if the defendant engages in personal
26 conduct that encourages or assists the infringement." A&M Records v.
27 Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001) ("Napster")
28

1 (internal quotations omitted). At the risk of turning the test into
2 a tautology, contributory infringement will lie only where the
3 defendant *contributed* to the infringement, i.e., knowingly and
4 intentionally assisted, induced or caused the infringement.

5 Therefore, to prevail on their contributory infringement claim,
6 Plaintiffs will have to show that Sharman *intended to contribute* to
7 the infringing conduct of another. Under Napster, 239 F.3d at 1020-
8 21, it would be insufficient for Plaintiffs in this case to allege
9 simply that Defendants' peer-to-peer file sharing software may be
10 used to infringe Plaintiffs' copyrights.

11 Indeed, Plaintiffs allege that Defendants have infringed
12 Plaintiffs copyrights through "willful, intentional and purposeful"
13 conduct. (See MGM v. Grokster FAC ¶64). To this effect, Plaintiffs
14 complain that Defendants: 1) actively participated in the
15 unauthorized distribution and reproduction of copyrighted works, and
16 2) provided the means and facilities for, and encouraged users to
17 engage in, unauthorized reproduction and distribution of copyrighted
18 works. (See MGM v. Grokster FAC ¶¶ 58-59, 62.)

19 However, the effects test is not satisfied simply by showing
20 that the tortious act was intentional. Rather, the intentional
21 conduct "must be targeted at a plaintiff whom the defendant knows to
22 be a resident of the forum state." Bancroft & Masters, 223 F.3d at
23 1087. Plaintiffs allege, and Sharman does not dispute, that Sharman
24 was and is aware that much of the alleged copyright infringement
25 affects Defendants. (Opp. at 5, 13-14) (Sharman was aware of this
26 litigation when it acquired Kazaa BV's assets, and Plaintiffs have
27 sent notices of millions of separate infringements committed by Kazaa
28

1 users to both Kazaa BV and Sharman). Moreover, Sharman is and has
2 been well aware of the charge that its users are infringing
3 copyrights, and reasonably should be aware that many, if not most,
4 music and video copyrights are owned by California-based companies.⁹

5
6 ⁹ Sharman argues that the California Supreme Court decision
7 in Pavlovich v. Superior Court, 2002 Cal. LEXIS 7959 (Cal. Nov. 25,
8 2002), which was recently stayed by the U.S. Supreme Court pending
9 further briefing, is persuasive in its holding that awareness of
10 possible injury to California-based industries does not satisfy the
11 knowledge prong of the effects test. In Pavlovich, a sharply divided
12 California Supreme Court reversed an appeals court decision upholding
13 jurisdiction in California over defendant Pavlovich, a Texas
resident. Pavlovich's sole contact with California consisted of
posting on the Internet the source code for a DVD encryption system
licensed by the plaintiff, an entertainment trade association based
in California. Id., at *4. The system was intended principally to
prohibit unauthorized reproduction of copyrighted motion pictures
distributed on DVD. Id.

14 The trade association argued in part that jurisdiction was
15 proper because Pavlovich knew the posting would harm not only the
16 licensor trade association, but also "the motion picture, computer
and consumer electronics industries centered in California." Id., at
*22-23. A bare four-judge majority found that this did not satisfy
the "effects test" for purposeful availment. Id., at *25.

17 However, the majority highlighted key facts that led to their
18 conclusion, and that distinguish the Pavlovich case from the instant
19 actions. First, the court questioned whether the argument was
20 relevant at all, since the trade association did not assert a claim
21 for illegal pirating of copyrighted works. Id., at *26. Thus, any
22 eventual injury to the entertainment industry from such pirating was
largely speculative, particularly considering that licensing of the
encryption standard to entertainment companies did not begin until
two months after Pavlovich posted the source code. Id., at *23, 26.
Second, the court emphasized that "there is no evidence that any
California resident ever visited, much less downloaded the [source
code]" from Pavlovich's website. Id., at *22.

23 Consequently, the majority conceded the narrowness of its
24 holding, and observed that "[a] defendant's knowledge that his
25 tortious conduct may harm industries centered in California is
undoubtedly relevant to any determination of personal jurisdiction
and may support a finding of jurisdiction." Id., at *31 (emphases
26 added). Indeed, the majority held only "that this knowledge alone is
insufficient to establish express aiming at the forum state as
27 required by the effects test." Id., at *31 (emphasis original).

28 In this case, there is evidence of continuous and substantial
contact with forum residents in addition to the alleged injuries.

1 (See Reyes Decl., Exh. 5, Deposition of Jeffrey Rose, at 135-136,
2 138-139.) See Panavision, 141 F.3d at 1321 (effects test satisfied
3 because defendant likely knew that plaintiff would suffer harm in
4 California, since "its principal place of business was in California,
5 and the heart of the theatrical motion picture and television
6 industry is located there.").

7 Thus, Plaintiffs have alleged that Sharman intentionally and
8 materially contributed to the infringement of Plaintiffs' works, and
9 that it did so with full knowledge that much of the harm from this
10 infringement would be suffered in California.¹⁰ This is sufficient to
11 establish a prima facie case of purposeful availment under the
12 effects test of Panavision.¹¹

13
14 Sharman is also aware of this and similar litigation, and has
15 received from Defendants myriad notices of alleged infringement.
16 Accordingly, knowledge of likely injury to the entertainment industry
17 is only one facet of Sharman's general knowledge that its alleged
18 conduct was and is likely to injure California residents. Thus, even
19 if this Court were governed by Pavlovich (which it is not), it is
20 apparent that the potential injury to California-based industries
21 would be an important "effects test" factor, whether or not it is
22 dispositive.

23
24 ¹⁰ Defendant's contention that "none of the harm complained of
25 was intended by the non-resident defendant Sharman," (Sharman Reply
26 at 9), goes to the merits of the action, not to whether Plaintiffs
27 have made a prima facie case of jurisdiction.

28
29 ¹¹ Several courts have exercised jurisdiction in analogous
30 contexts. See, e.g., Alto Prods. Corp v. Ratek Indus., 1996 U.S.
31 Dist. LEXIS 12812 (S.D.N.Y. Sept. 3, 1996) (jurisdiction in Lanham
32 Act case where foreign defendant had no contact with forum state
33 other than in-state sales through a distributor with knowledge the
34 distributor was selling in the forum) (citing Levi Strauss & Co. v.
35 Textiles Y Confecciones Europeas, S.A., 222 U.S.P.Q. (BNA) 971
36 (S.D.N.Y. 1983) (jurisdiction in contributory trademark infringement
37 claim in similar circumstances)); Blue Ribbon Pet Prods., Inc. v.
38 Rolf C. Hagen (USA) Corp., 66 F. Supp. 2d 454, 460 (E.D.N.Y. 1999)
39 ("Canada's out-of-state acts contributed to or induced Hagen USA's
40 infringement . . . within New York and are sufficient to subject it

3. Vicarious Liability

Sharman's argument appears to have more merit as applied to the vicarious liability claims. As the Napster court noted, vicarious liability "is an 'outgrowth' of respondeat superior." 239 F.3d at 1022 (citing Fonovisa, 76 F.3d at 262). Though claims for vicarious copyright infringement extend beyond the employer/employee context, they are limited to those cases where the defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." Id. (quoting Gershwin, 443 F.2d at 1162).

Notably, however, neither an intent to infringe nor knowledge of direct infringement is an element of this tort. See Napster, 239 F.3d at 1022-24 (failure to police system combined with financial interest in ongoing infringement sufficient to justify preliminary injunction); Shapiro Bernstein and Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963) (imposing vicarious liability on owner of department store chain for infringing sales by independent concessionaire, despite fact that owner was unaware of the infringement).

Thus, it is somewhat doubtful that the alleged acts comprising vicarious liability are sufficient to satisfy the intentional act and express aiming requirements of the effects test under Panavision. See also Bancroft & Masters, 223 F.3d at 1087. Nonetheless, because the Court has concluded that purposeful availment is otherwise demonstrated in these cases, it is unnecessary to conclude that the effects test alone demonstrates purposeful availment for all claims.

to personal jurisdiction in New York").

b) Reasonableness

Even where sufficient minimum contacts are demonstrated, an exercise of personal jurisdiction is constitutional only if "reasonable."¹² Burger King, 471 U.S. at 476-78; Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981). Conversely, considerations of reasonableness may justify jurisdiction upon a lesser showing of contacts than is customarily required. Burger King, 471 U.S. at 477; Ochoa v. J.B. Martin & Sons Farms, 287 F.3d 1182, 1189 n.2 (9th Cir. 2002).

Thus, notwithstanding the analysis above, the due process inquiry "cannot be simply mechanical or quantitative," nor can it be resolved by determining whether a defendant's conduct is "a little more or a little less" than some theoretical threshold. International Shoe, 326 U.S. at 319. Rather, "[t]he essence of the issue here, at the constitutional level, is . . . one of general fairness to the corporation." Perkins, 342 U.S. at 445.

This fairness consists principally of ensuring that jurisdiction over a person is not exercised absent "fair warning that a particular activity may subject [that] person to the jurisdiction of a foreign sovereign." Shaffer v. Heitner, 433 U.S. 186, 218, 97 S. Ct. 2569 (1977) (Stevens, J., concurring in the judgment), quoted in Burger King, 471 U.S. at 472. In other words, the Due Process Clause gives "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum

¹² An otherwise valid exercise of jurisdiction is presumed to be reasonable, however, and the burden is upon the defendant to "present a compelling case" that it is not. Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995) (quoting Burger King, 471 U.S. at 477).

1 assurance as to where that conduct will and will not render them
2 liable to suit." World-Wide Volkswagen, 444 U.S. at 297.

3 Accordingly, the touchstone constitutional inquiry is whether
4 the defendant's "conduct and connection with the forum State are such
5 that he should reasonably anticipate being haled into court there."
6 Id., quoted in Calder v. Jones, 465 U.S. at 790, and Kulko v.
7 Superior Court, 436 U.S. at 97-98; see also Gordy v. Daily News,
8 L.P., 95 F.3d 829, 832 (9th Cir. 1996) (this inquiry is the
9 "touchstone" of due process); Lake v. Lake, 817 F.2d 1416, 1421 (9th
10 Cir. 1987) ("fundamental determination"); Sher v. Johnson, 911 F.2d
11 1357, 1361 (9th Cir. 1990).

12 Plaintiffs clearly have carried their burden in this respect.
13 Sharman provides its KMD software to millions of users every week,
14 and executes a licensing agreement with each user permitting use of
15 the software. Sharman has not denied and cannot deny that a
16 substantial number of its users are California residents, and thus
17 that it is, at a minimum, constructively aware of continuous and
18 substantial commercial interaction with residents of this forum.
19 Further, Sharman is well aware that California is the heart of the
20 entertainment industry, and that the brunt of the injuries described
21 in these cases is likely to be felt here. It is hard to imagine on
22 these bases alone that Sharman would not reasonably anticipate being
23 haled into court in California.

24 However, jurisdiction is reasonable for an important added
25 reason: Sharman's effective predecessor, Kazaa BV, was engaged in
26 this very litigation when Sharman was formed. Sharman was apparently
27 created for the sole purpose of acquiring Kazaa BV's key assets and
28

1 taking over operation of the Kazaa system. Sharman assumably was
2 aware when it formed that Kazaa BV had not contested jurisdiction in
3 this litigation, but rather had answered and counterclaimed in both
4 cases. Had Sharman actually acquired and merged with Kazaa BV, there
5 is little question that Sharman would be held to answer in this Court
6 in place of Kazaa BV. Because Sharman has succeeded Kazaa BV in
7 virtually every aspect of its business, Sharman reasonably should
8 have anticipated being required to succeed Kazaa BV in this
9 litigation as well. If Sharman wished to "structure [its] primary
10 conduct with some minimum assurance" that it would not be haled into
11 court in this forum, it simply could have avoided taking over the
12 business of a company already enmeshed in litigation here.

13 Nor has Sharman made a "compelling case" that jurisdiction would
14 be unreasonable on the basis of any of the other factors considered
15 with respect to reasonableness: 1) the extent of the defendant's
16 purposeful interjection into the forum state's affairs; 2) the burden
17 on the defendant; 3) conflicts with the sovereignty of defendant's
18 state/nation; 4) the forum's interest in adjudicating the dispute; 5)
19 the most efficient judicial resolution of the dispute; 6) the
20 plaintiff's interest in convenient and effective relief; and, 7) the
21 existence of an alternative forum. Sinatra v. National Enquirer,
22 Inc., 854 F.2d 1191, 1198-99 (9th Cir. 1988).

23
24 1) Purposeful Interjection

25 The factor of purposeful interjection is satisfied by a finding
26 of purposeful availment, discussed supra. See Roth v. Garcia
27 Marquez, 942 F.2d 617, 623 (9th Cir. 1991); Sinatra, 854 F.2d at
28

1 1199; Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784
2 F.2d 1392, 1401 (9th Cir. 1986).

3
4 2) Burden on the Defendant

5 The Court is sensitive to the considerable burden placed on a
6 defendant forced to litigate in a foreign country under foreign law.
7 See, e.g., Asahi Metal Industry Co. v. Superior Court of California,
8 480 U.S. 102, 114, 107 S. Ct. 1026 (1987). However, "modern advances
9 in communications and transportation have significantly reduced the
10 burden of litigating in a foreign country." Sinatra, 854 F.2d at
11 1199; see also Sher v. Johnson, 911 F.2d at 1365. Moreover, this
12 factor is less salient where the defendant speaks English and has
13 traveled to the forum on business related to the instant action. See
14 Dole Food Co. v. Watts, 303 F.3d 1104, 1115 (9th Cir. 2002).

15 Sharman's principal, employees and representatives speak
16 English, and have shown considerable facility interacting with this
17 forum. As discussed supra, Sharman has engaged in extensive contacts
18 with the forum, including the retention of public relations
19 representatives and law firms for purposes other than this
20 jurisdictional challenge, negotiations in California of at least one
21 contract, commercial relationships with California companies, and the
22 assumption of contracts with California forum and choice of law
23 provisions. The burden of litigating in this forum is thus not so
24 great as to "overcome [the] clear justifications for the exercise of
25 jurisdiction." Caruth v. International Psychoanalytical Ass'n, 59
26 F.3d 126, 128-29 (9th Cir. 1995).

3) Conflicts with Law and Sovereignty of
Foreign State

The Supreme Court has indicated that courts should be cautious in extending "long-arm" jurisdictional statutes in the international context. "'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" Asahi Metal Industry Co., 480 U.S. at 115 (quoting United States v. First National City Bank, 379 U.S. 378, 404, 85 S. Ct. 528 (1965)). However, "this factor is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court." Haisten, 784 F.2d at 1401-02 (quotation omitted). Further, it weighs less heavily where, as here, the defendant engages in significant contact with the forum state. See Sinatra, 854 F.2d at 1199 (defendant maintained an agent in California, advertised heavily there, and considered California a top source of American clients).

4) Forum State's Interest in Adjudicating the
Dispute

California has an interest in providing effective judicial redress for its citizens. Sinatra, 854 F.2d at 1200. This interest is particularly strong where the claim is one for tortious injury. See, e.g., Panavision, 141 F.3d at 1323 (trademark infringement); Gordy v. Daily News, 95 F.3d at 836 (defamation); Plant Food Co-Op v. Wolfkill Feed & Fertilizer Corp., 633 F.2d 155 (9th Cir. 1980) (breach of warranty). Because the claims in this case implicate

1 | widespread, pervasive infringement of copyrights owned by California
2 | residents, the state's interest is considerable.

3 |
4 | 5) Efficiency of the Forum

5 | In determining the efficiency of the forum, the Court looks
6 | primarily at where the evidence and witnesses are likely to be
7 | located. Panavision, 141 F.3d at 1324; Caruth, 59 F.3d at 129; Core-
8 | Vent Corp., 11 F.3d at 1489; Sinatra, 854 F.2d at 1200. At first
9 | blush, this factor would seem to favor a forum in Australia or
10 | Vanuatu, at least with respect to Sharman, since that is where
11 | Sharman is operated and where evidence and witnesses regarding
12 | Sharman's conduct seem most likely to be located. Plaintiffs have,
13 | however, identified a number of fact witnesses located in California
14 | and other U.S. states. (Opp. at 24.) Furthermore, discovery and
15 | other aspects of these cases proceeded for some time in this Court
16 | prior to Sharman's formation, acquisition of the Kazaa system, and
17 | addition as a Defendant. The Court is thus already immersed in this
18 | litigation and best suited to adjudicate it.

19 |
20 | 6) Convenient and Effective Relief for
21 | Plaintiff

22 | While litigating in Australia or Vanuatu would undoubtedly be
23 | inconvenient for Plaintiffs, little weight has been given to this
24 | factor. Panavision, 141 F.3d at 1324 (citing Ziegler, 64 F.3d at
25 | 476). This is particularly true where, as here, Plaintiffs have
26 | considerable resources and could litigate elsewhere if necessary.
27 | However, Sharman has not demonstrated that *effective relief* -
28 |

1 remedies for infringement of U.S. copyrights within the United States
2 - would be available other than in a U.S. forum (see infra).

3
4 7) Existence of an Alternative Forum

5 The plaintiff bears the burden of establishing that an
6 alternative forum is not available, though this factor is significant
7 only if other factors weigh against an exercise of jurisdiction.
8 Corporate Inv. Business Brokers v. Melcher, 824 F.2d 786, 791 (9th
9 Cir. 1987); Pacific-Atlantic Trading Co. v. M/V Main Express, 758
10 F.2d 1325, 1331 (9th Cir. 1985). Although Australia or Vanuatu might
11 be alternative forums for suing Sharman, it is not clear that the
12 non-Australian co-Defendants would be amenable to service of process
13 in either country. Moreover, these are suits under U.S. law for
14 copyright infringement within the United States. Thus, even if a
15 foreign court were available to hear this litigation, it would be
16 forced to interpret U.S. law. "This fact alone militates heavily in
17 favor of this Court's assertion of jurisdiction." Batzel v. Smith,
18 2001 U.S. Dist. LEXIS 8929, at *12 (C.D. Cal. June 6, 2001).

19 In sum, Sharman has not made a "compelling case" that the
20 otherwise appropriate exercise of jurisdiction is unreasonable in
21 these circumstances. Thus, specific jurisdiction over Sharman is
22 consistent with constitutional due process.

23
24 4) Nationwide Aggregation

25 Finally, the Court notes that even if jurisdiction over Sharman
26 were unavailable in California state courts, it would nonetheless be
27 appropriate in this Court on the basis of Sharman's aggregated U.S.
28

1 contacts. Rule 4(k)(2) of the Federal Rules of Civil Procedure
2 permits nationwide aggregation for cases arising under federal law,
3 unless 1) the defendant is subject to jurisdiction of the courts of
4 general jurisdiction of any state, or 2) aggregation is expressly
5 forbidden by the relevant law. See Fed. R. Civ. P. Rule 4(k)(2);
6 Quokka Sports, Inc. v. Cup Int'l Ltd., 99 F. Supp. 2d 1105, 1110-11
7 (N.D. Cal. 1999).

8 Although Fifth Amendment due process governs the
9 constitutionality of jurisdiction under Rule 4(k)(2), the Fourteenth
10 Amendment's protections are analogous, and the same "minimum
11 contacts" analysis is applied. See, e.g., Central States, Southeast
12 & Southwest Areas Pension Fund v. Reimer Express, 230 F.3d 934, 946
13 n.10 (7th Cir. 2000); Aerogroup Int'l v. Marlboro Footworks, 956 F.
14 Supp. 427, 439 (S.D.N.Y. 1996) (collecting cases). The effect of the
15 Rule in cases such as this is that jurisdiction may be exercised over
16 copyright claims against a foreign defendant where sufficient
17 contacts with, or injury to, U.S. residents is alleged, even though
18 there are not sufficient contacts with any single state to justify
19 jurisdiction in that state. See Jane C. Ginsburg, Copyright Without
20 Borders? Choice of Forum and Choice of Law for Copyright Infringement
21 in Cyberspace, 15 Cardozo Arts & Ent. LJ 153, 161-65 (1997).

22 The analysis set forth supra applies even more forcefully when
23 Sharman's nationwide contacts are considered. First, Sharman's
24 commercial availment of and contact with the U.S. forum is manifestly
25 and geometrically greater than that of and with the California forum.
26 Second, Sharman's distribution of its software to U.S. residents is a
27 but for cause of all of the infringement alleged in this case, even
28

1 if use by California residents is a but for cause of only a portion
2 of that injury. Additionally, to the extent that the injuries
3 alleged in these cases did not foreseeably accrue to California
4 residents, there is little doubt that Sharman knows or should know
5 that the vicarious or contributory infringement of media copyrighted
6 by U.S. persons under U.S. law is likely to injure U.S. residents.

7 In sum, even if Sharman could not reasonably anticipate being
8 haled into a court in this state, it certainly could reasonably
9 anticipate being haled into a court in this country. Thus,
10 jurisdiction could be exercised constitutionally in this Court
11 pursuant to Rule 4(k)(2) even if it could not be so exercised by
12 California state courts.

13
14 B. Venue

15 Sharman also moves for dismissal for improper venue. If
16 personal jurisdiction in a copyright case may be exercised over a
17 corporation in a district, then venue also is proper in that
18 district. 28 U.S.C. §1400; Colt Studio, Inc. v. Badpuppy Enter., 75
19 F. Supp. 2d 1104, 1112 (C.D. Cal. 1999). Because the Court concludes
20 that jurisdiction is proper in this district, venue is proper as
21 well.

22
23 C. Forum Non Conveniens

24 Sharman additionally moves for dismissal on the grounds of forum
25 non conveniens. The plaintiff's chosen forum "should rarely be
26 disturbed" unless the balance of interests "is strongly in favor of
27 the defendant." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.
28

1 Ct. 839 (1947). Key in this analysis is the availability of an
2 alternative forum where *all* defendants are amenable to personal
3 jurisdiction. Watson v. Merrell Dow Pharmaceuticals, 769 F.2d 354,
4 357 (6th Cir. 1985); In re Air Crash Disaster Near New Orleans, La.
5 on July 9, 1982, 821 F.2d 1147, 1168-69 (5th Cir. 1987). Sharman has
6 made no showing that its non-Australian co-Defendants are amenable to
7 suit in Australia or Vanuatu. Moreover, while it is irrelevant that
8 an alternative forum's law may be unfavorable to Plaintiffs' claims,
9 the subject matter of the dispute must at least be actionable there.
10 See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252-54, 102 S. Ct. 252
11 (1981). Sharman has failed to demonstrate that a derivative action
12 arising from copyright infringement by Sharman's U.S. users - to
13 which these suits are limited - would be available in either
14 Australia or Vanuatu.

15 Nor has Sharman shown that the balance of private and public
16 interest factors favors dismissal. See Lockman Foundation v.
17 Evangelical Alliance Mission, 930 F.2d 764, 767 (9th Cir. 1991).
18 Thus, Sharman has failed to "overcome the great deference . . . due
19 plaintiffs" in their choice of forum. Ceramic Corp. of Am. v. Inka
20 Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993) (quotations omitted).

21
22 D. Political Question Doctrine

23 Sharman also argues that the Complaint should be dismissed
24 pursuant to the political question doctrine. Under that doctrine, a
25 court should not rule on a case if the issues to be litigated are
26 best resolved by the political process.
27
28

1 In the seminal case of Baker v. Carr, 369 U.S. 186 (1962), the
2 Supreme Court explained:

3 Prominent on the surface of any case held to
4 involve a political question is found a textually
5 demonstrable commitment of the issue to a
6 coordinate political department; or a lack of
7 judicially discoverable and manageable standards
8 for resolving it; or the impossibility of deciding
9 without an initial policy determination of a kind
10 clearly for nonjudicial discretion; or the
11 impossibility of a court's undertaking independent
12 resolution without expressing lack of respect due
13 coordinate branches of government; or an unusual
14 need for unquestioning adherence to a political
15 decision already made; or the potentiality of
16 embarrassment from multifarious pronouncements by
17 various departments on one question.

18 Id. at 217.

19 The areas where the doctrine principally has been applied are:
20 1) the Republican Form of Government Clause and the electoral
21 process; 2) foreign affairs; 3) Congress's ability to regulate its
22 internal processes; 4) the process for ratifying constitutional
23 amendments; 5) instances where the federal court cannot shape
24 effective equitable relief; and 6) the impeachment process. See
25 generally Erwin Chemerinsky, Federal Jurisdiction, at 142-66 (2d ed.
26 1994).

1 Sharman seems to argue that a confluence of factors justify
2 invocation of the doctrine, from the international implications of
3 the relief sought, to the judge-made nature of the copyright theories
4 alleged, to the First Amendment protections potentially applicable to
5 the source code at issue in this case. None of these concerns
6 constitute the types of factors sufficient to divest the Court of
7 jurisdiction under the political question doctrine. Rather, most
8 relate to the ability of the Court to grant the relief sought by
9 Plaintiffs, and not to the Court's jurisdiction to hear the case.
10 Consideration of these concerns, particularly those relating to
11 international comity, are appropriate if at all in determining the
12 scope of any relief, should liability be established.

13 Sharman also seems to argue that the Court should abstain from
14 hearing these cases in light of ongoing congressional evaluation of
15 the technologies implicated. Sharman cites Sony v. Universal
16 Studios, Inc., 464 U.S. 417, 104 S. Ct. 774 (1984):

17 The judiciary's reluctance to expand the protections
18 afforded by the copyright without explicit
19 legislative guidance is a recurring theme.
20 [Citations.] Sound policy, as well as history,
21 supports our consistent deference to Congress when
22 major technological innovations alter the market for
23 copyrighted materials. Congress has the
24 constitutional authority and the institutional
25 ability to accommodate fully the raised permutations
26 of competing interests that are inevitably implicated
27 by such new technology.
28

1 In a case like this, in which Congress has not
2 plainly marked our course, we must be circumspect in
3 construing the scope of rights created by a
4 legislative enactment which never calculated such a
5 calculus of interests.

6 464 U.S. at 431 (citations omitted).

7 Indeed, if and when this Court reaches the merits of the claims
8 against Defendants, it will be obligated to bear in mind these and
9 other invocations of the Supreme Court. But the quoted language
10 relates to statutory construction, not to jurisdiction. Nothing in
11 Sony suggests that this Court should refuse to hear the instant cases
12 merely because they present novel or dynamic questions of law. The
13 Court cannot abstain from adjudicating actions properly before it
14 based upon mere speculation or hope that greater legislative guidance
15 may one day be afforded.

16
17 E. Sharman's Extraterritorial Activities

18 Sharman also contends that the Court does not have subject
19 matter jurisdiction over the case because Sharman's allegedly
20 wrongful conduct purportedly takes place entirely outside the United
21 States, and because U.S. law cannot be applied extraterritorially
22 unless Congress so authorizes. See EEOC v. Arabian Am. Oil Co., 499
23 U.S. 244, 248 (1991).

24 While Sharman argues that its alleged wrongful acts are not
25 covered by the Copyright Act, the very case cited for this
26 proposition holds otherwise. See Armstrong v. Virgin Records, Ltd.,
27 91 F. Supp. 2d 628, 635-36 (S.D.N.Y. 2000). Armstrong is a case in
28

1 which, in Sharman's own words, the court held that "United States
2 courts can exercise subject matter jurisdiction under the Copyright
3 Act over foreign defendants whose extraterritorial acts aid, induce
4 or contribute to copyright infringement by another within the United
5 States." (Sharman Mot. at 8.) See also ITSI T.V. Prods., Inc. v.
6 California Auth. of Racing Fairs, 785 F. Supp. 854, 864 (E.D. Cal.
7 1992) ("To satisfy the jurisdictional requirement that the defendant
8 commit an act of infringement in the United States, the plaintiff
9 must show only that the direct act of infringement for which
10 defendant is contributorily or vicariously liable occurred in the
11 United States."), rev'd in part on other grounds, 3 F.3d 1289 (9th
12 Cir. 1993). This is precisely what is alleged here.

13 14 **IV. LEF'S MOTION TO DISMISS**

15 **A. The Parties' Arguments**

16 Defendant LEF Interactive PTY, Ltd. ("LEF") moves to dismiss for
17 lack of personal jurisdiction only. LEF contends that it is "a
18 management company that merely provides services to other businesses,
19 one of whom is [Sharman]." (Memo of P&A in Support of LEF's Mot. to
20 Dismiss ("LEF Mot."), at 1.) LEF argues that it does not own or
21 operate the Kazaa system or have any other relationship with the
22 conduct charged in these actions. (Id.) Rather, LEF asserts, it is
23 an Australian business with no connection to this case, and no other
24 contacts with the United States or California. (Id.) Naming LEF as
25 a Defendant, it adds, "makes no more sense than naming Sharman's
26 accountants." (Id.)

1 Plaintiffs assert, in contrast, that LEF and Sharman are
2 virtually coterminous. For instance, they were formed at the same
3 time, February 2002, by the same principal and owner, Nicola Hemming.
4 Every LEF employee has only Sharman as a paying client, and all of
5 LEF's revenue comes from Sharman. (Pls.' Opp. to LEF's Mot.
6 ("Opp."), at 11.) Plaintiffs add that LEF has interchangeably
7 referred to itself as Sharman or LEF, that LEF's employees are or
8 were listed on the Kazaa.com website as members of "the Sharman
9 team," that LEF's office door and letterhead bear the Kazaa logo, and
10 that there is no independent LEF e-mail address - employees receive
11 e-mail at "sharmannetworks.com." (Id.) Finally, until recently,
12 Sharman and LEF shared the same phone number, and LEF answered the
13 phone "Sharman Networks." (Id.) In short, Plaintiffs claim, LEF was
14 formed for the sole purpose of operating nearly every aspect of
15 Sharman's business. (Id. at 10.)

16 Therefore, Plaintiffs argue that LEF and Sharman are corporate
17 alter egos, and thus that personal jurisdiction over Sharman may be
18 imputed to LEF. (See Opp. at 21.) Indeed, LEF's counsel conceded at
19 hearing on this Motion that employees of LEF do conduct much of
20 Sharman's business. LEF maintains that management relationships such
21 as this are common in Australia, however, and that they do not
22 automatically render the management company amenable to suit in any
23 jurisdiction into which the client corporation may be haled. Rather,
24 LEF contends, jurisdiction does not exist because LEF does not
25 independently have sufficient "minimum contacts" with the forum.

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27 ///

1 B. Analysis

2 1. Corporate Alter Ego

3 Plaintiffs posit the jurisdictional inquiry as a question of
4 corporate alter ego. Under the alter ego doctrine, one corporation
5 may be liable for the actions of another where it is shown that "(1)
6 there is such unity of interest and ownership that the separate
7 personalities of [the corporations] no longer exist and (2) that
8 failure to disregard [their separate identities] would result in
9 fraud or injustice.'" AT&T v. Compagnie Bruxelles Lambert, 94 F.3d
10 586, 591 (9th Cir. 1996) (quoting Watson v. Commonwealth Ins. Co., 8
11 Cal. 2d 61, 63, P.2d 295, 298 (Cal. 1936)). Where a parent company
12 is the corporate alter ego of a subsidiary, the forum contacts of the
13 subsidiary may be imputed to the parent for purposes of establishing
14 personal jurisdiction. See, e.g., Doe v. Unocal Corp., 248 F.3d 915,
15 926 (9th Cir. 2001); AT&T, 94 F.3d at 591.

16 Plaintiffs assert and the Court agrees that there is a clear
17 unity of interest between Sharman and LEF.

18 The second prong of the alter-ego analysis, whether disregarding
19 the companies' separate identities would result in fraud or
20 injustice, often looks to whether corporate formalities are ignored,
21 or to whether one company is undercapitalized in an attempt to shield
22 the alter ego from financial liability. See, e.g., Firstmark Capital
23 Corp. v. Hempel Financial Corp., 859 F.2d 92, 93 (9th Cir. 1988);
24 Flynt Distributing Co., 734 F.2d 1389, 1393-94 (9th Cir. 1984).
25 Here, Plaintiffs have not alleged that Sharman is undercapitalized,
26 or that corporate formalities have been ignored, or that any other
27 fraud has occurred between the two companies. Rather, Plaintiffs
28

1 make two claims. First, they argue that a failure to exercise
2 jurisdiction over LEF would insulate Sharman's de facto staff from
3 the Court's discovery jurisdiction. (See Opp. at 22.) Thus, they
4 assert, Sharman could simply characterize its "employees" - who
5 technically work for LEF - as foreign third parties from whom
6 evidence cannot be taken. (Id.) Second, Plaintiffs contended at
7 hearing on this Motion that full recovery for the alleged
8 infringement of their copyrights would be hindered if LEF and its
9 assets were not subject to this Court's jurisdiction.

10 The Court is skeptical as to whether either of these claims
11 constitutes the type of "fraud or injustice" typically considered
12 sufficient to justify ignoring corporate distinctions. The Court
13 concludes, however, that Plaintiffs employ the wrong standard.

14 15 2. Minimum Contacts

16 Many courts conflate the requirements of due process and alter
17 ego liability. However, the "minimum contacts" approach of
18 International Shoe clearly has supplanted the mechanical, formalistic
19 approach of cases like Cannon Mfg. Co. v. Cudahy Packing Co., 267
20 U.S. 333, 334, 45 S. Ct. 250 (1925) (no jurisdiction where absent
21 parent, and subsidiary present in forum, observe corporate
22 formalities, despite fact that parent dominates subsidiary
23 "immediately and completely"). See In re Teletronics Pacing Systems,
24 Inc., Accufix Atrial "J" Leads Products Liability Litigation, 953 F.
25 Supp. 909, 914-18 (S.D. Ohio 1997) (expanding on the evolution away
26 from these mechanical concepts and the abandonment of corporate alter
27 ego as the relevant jurisdictional inquiry), rev'd on other grounds
28

1 221 F.3d 870 (6th Cir. 2000). As the Sixth Circuit in Velandra v.
2 Regine Nationale des Usines Renault observed:

3 The law relating to the fictions of agency and of separate
4 corporate entity was developed for purposes other than
5 determining amenability to personal jurisdiction, and the law of
6 such amenability is merely confused by reference to these
7 inapposite matters.

8 The International Shoe decision represented an effort by the
9 Supreme Court to clarify earlier concepts in the areas of the
10 amenability of foreign corporations to the personal jurisdiction
11 of state courts by sweeping aside any lingering notions that the
12 earlier shibboleths of "consent," "presence," and "doing
13 business" were self-defining abstractions, and by redefining
14 those tests in terms of "minimum contacts."

15 336 F.2d 292, 297 (6th Cir. 1964), cited in In re Teletronics Pacing
16 Systems, Inc., 953 F. Supp. at 915; see generally Lea Brilmayer and
17 Kathleen Paisley, Personal Jurisdiction and Substantive Legal
18 Relations: Corporations, Conspiracies and Agency, 74 Cal. L. Rev. 1
19 (1986).

20 Similarly, in Wells Fargo & Co. v. Wells Fargo Express Co., the
21 Ninth Circuit reversed a district court's denial of personal
22 jurisdiction over a nonresident corporation, which the court had
23 predicated on Cannon. 556 F.2d 406 (9th Cir. 1977). The circuit
24 court sent the case back to the district court to consider whether
25 forum contacts other than those considered under Cannon were
26 sufficient to establish jurisdiction. Id. at 426. Among other
27 contacts, the Ninth Circuit noted plaintiffs' theory that the in-
28

1 state subsidiary may have acted as the agent of the out-of-state
2 parent, conducting its forum activities "at the behest, and under the
3 control" of the latter. Id. at 419. The Wells Fargo court concluded
4 that all of defendant's contacts, including and in addition to those
5 constituting a possible corporate alter ego relationship, should be
6 considered in the jurisdictional inquiry. Id. at 419-20.

7 Thus, the controlling question remains whether the defendant has
8 such minimum contacts with the forum state that it should reasonably
9 anticipate being haled into court there. In the parent-subsidary
10 context, several courts have articulated this as a requirement that
11 plaintiff show either "(1) attribution, 'that the absent parent
12 instigated the subsidiary's local activity;' or (2) merger, 'that the
13 absent parent and the subsidiary are in fact a single legal entity.'" Third National Bank v. WEDGE Group, 882 F.2d 1087, 1092, 1094 (6th
14 Cir. 1989) (Keith, J., concurring) (quoting Brilmayer & Paisley,
15 supra); In re Teletronics Pacing Systems, Inc., 953 F. Supp. at 918-
16 19 (collecting cases employing similar standards).

17
18 "The attribution test implies that the in-forum subsidiary is
19 acting on behalf of the absent parent. Thus, the Court attributes
20 the subsidiary's contacts to the parent because the parent
21 'purposefully avails' itself of doing business in the forum by
22 accessing the market through a subsidiary." In re Teletronics Pacing
23 Systems, Inc., 953 F. Supp. at 919; see Wells Fargo & Co., 556 F.2d
24 at 419.

25 Under the merger theory of jurisdiction, the two entities are so
26 closely aligned that it is reasonable for the parent to
27 anticipate being "haled" into court in the forum because of its
28

1 relationship with its subsidiary. Some factors that might
2 indicate a sufficient relationship with the subsidiary to
3 justify jurisdiction include overlap in board of directors and
4 officers, interchange of personnel between the parent and the
5 corporation, exchange of documents and records between parent
6 and subsidiary, listing subsidiary as a branch, agency, or
7 division of the parent, or indicating that subsidiary and parent
8 are part of the same entity . . .

9 In re Teletronics Pacing Systems, Inc., 953 F. Supp. at 919.

10
11 3. Application to LEF

12 Despite the relatively novel corporate affiliation at issue in
13 the instant actions, the relationship between Sharman and LEF
14 includes the indicia of both attribution and merger. First,
15 attribution is satisfied by Plaintiffs' showing that Sharman's
16 activities are predominantly instigated or maintained by employees of
17 LEF. Second, the extensive overlap of corporate operation and
18 perception, described above, shows a tremendous degree of "merger"
19 between the two companies. As set forth above, Sharman has
20 sufficient contacts with California to subject it to jurisdiction
21 here. LEF's actions through and with Sharman similarly subject it to
22 jurisdiction in this Court. Thus, whether or not these facts
23 establish corporate alter ego for purposes of liability, they satisfy
24 the due process jurisdictional inquiry.

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V. CONCLUSION

Therefore, the Court hereby DENIES Defendant Sharman Network Ltd.'s Motion to Dismiss the First Amended Complaint for Lack of Subject Matter Jurisdiction and Other Grounds, and DENIES Defendant LEF Interactive's Motion to Dismiss for Lack of Personal Jurisdiction.

IT IS SO ORDERED.

DATED :

1/8/03


STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE